

# Answering the West Lothian Question? A Critical Assessment of ‘English Votes for English Laws’ in the UK Parliament

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In 2015, the UK House of Commons adopted new procedures known as ‘English Votes for English Laws’ (EVEL). This article evaluates whether EVEL has succeeded in answering the West Lothian Question, a constitutional anomaly arising from the asymmetrical character of governance in the UK. After outlining the historical background against which EVEL emerged as a supposed solution to this iconic question, the article explains how the 2015 reform works, and proceeds to assess its operation during the 2015–2017 parliament. It concludes that these new procedures appear to have overcome the main practical and constitutional obstacles associated with this type of reform, but they have, so far, failed to provide meaningful English representation at Westminster—particularly in relation to supplying England, and its MPs, with an enhanced ‘voice’.

Keywords: Devolution, English Votes for English Laws, House of Commons, Parliament, West Lothian Question, Westminster

In October 2015, the UK’s newly elected Conservative government introduced a set of revisions to the standing orders of the House of Commons, commonly referred to as ‘English Votes for English Laws’ (or EVEL). This involved the implementation of new procedures designed to ensure that, on certain matters relating only to England (or England and Wales), MPs representing constituencies in the relevant part(s) of the UK would be given greater prominence during parliamentary proceedings.<sup>1</sup> A central feature of the reform was the creation of

<sup>1</sup>In the sole case of Finance Bills and associated business, legislative provisions may also be certified as relating exclusively to England, Wales and Northern Ireland. As this occurs relatively rarely, we do not generally specify it in this article.

new ‘legislative grand committees’, composed of all English (or English and Welsh) MPs, with the capacity to debate and—most controversially—veto legislative provisions, even if these commanded the support of the whole House. The procedures proved highly contentious in party political terms, and in the final vote to approve them MPs divided neatly along partisan lines.<sup>2</sup>

The name given to the changes says much about the core motivation behind them, and the area of public concern they were designed to address. During the 2014 Scottish independence referendum campaign, all of the main unionist parties pledged to transfer new legislative powers from Westminster to the Scottish Parliament in an attempt to shore up support for the union. But the further extension of devolution in Scotland threatened simultaneously to reignite the ‘English Question’—the wider issue of how England should be governed and represented in the post-devolved UK. More specifically, it focused attention on the ‘West Lothian Question’, a long-standing complaint about the perceived unfairness of asymmetric devolution for English representation within the Westminster parliament, which had been widely judged to be fundamentally unanswerable. In the light of prime minister David Cameron’s assertion in September 2014 that EVEL would constitute a ‘decisive answer’ to the West Lothian Question that would enable the ‘voices of England [to] be heard’ (Cameron, 2014), and given the level of disagreement which these procedures have elicited at Westminster, the effectiveness and implications of this historic reform demand more careful assessment than they have hitherto received.

This article provides an in-depth assessment of the extent to which these procedures might be considered a success, and considers whether they have lived up to some of the grand rhetoric—including about providing the English with a more powerful ‘voice’—with which they have been surrounded. It draws on evidence gathered during a major research project examining EVEL, focusing particularly on its operation during the 2015–2017 parliament. This included detailed analysis of the new standing orders themselves and of the parliamentary records of every occasion on which the procedures applied during this period. In addition, we have conducted around 40 interviews with key figures, including parliamentarians from across the major parties, officials from within parliament, government and the main parties, as well as various constitutional experts and analysts. Some of these are explicitly cited below, but they also, more broadly, inform our analysis of the new procedures and their implications.

The article is divided into four main sections. We begin by setting out the historical backdrop to this reform, outlining the emergence of the West Lothian Question in the 1970s, and the various answers proposed to it following the

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<sup>2</sup>All MPs in support were Conservatives, while all those against were from opposition parties (including one independent) (HC Deb 22 October 2015, cc1253–56).

introduction of devolution in the late 1990s. In the second section, we review existing debates about the perceived obstacles and differing rationales for reform in order to identify a series of criteria against which to assess EVEL's effectiveness in 'answering' this iconic question. In the third section, we briefly outline the procedures introduced by the government in 2015. And then, in the fourth and final part of the article, we analyse EVEL's operation against the above criteria, considering whether it has surmounted obstacles that have often been viewed as insuperable, and asking whether it represents a meaningful and coherent form of English representation. The article concludes with a summary of the evidence from the 2015–2017 period and some reflections on the future prospects for EVEL.

## 1. Devolution and the emergence of the West Lothian Question

To understand the reasons for the introduction of EVEL, it is necessary to look back to when the West Lothian Question first appeared in UK politics and assess how its significance and potential solubility have been viewed since. The Labour government elected in 1974 sought unsuccessfully to implement devolution to Scotland and Wales. One of the principal objections offered by opponents was that such a reform would create an asymmetry in territorial governance and representation across the UK, which would in turn establish an endemic unfairness at Westminster. Summarising this objection in a Commons debate on the Scotland Bill in 1977, Tam Dalyell, then Labour MP for West Lothian, posed the following question:

For how long will English constituencies and English hon. Members tolerate not just 71 Scots, 36 Welsh and a number of Ulstermen but at least 119 hon. Members from Scotland, Wales and Northern Ireland exercising an important, and probably often decisive, effect on English politics while they themselves have no say in the same matters in Scotland, Wales and Ireland?<sup>3</sup>

Dalyell's complaint was that, after devolution, English MPs would be denied the opportunity to participate on matters devolved to Scotland, Wales and Northern Ireland, while MPs representing constituencies in those territories would continue to be able to influence equivalent matters relating only to England. The anomaly he identified was not new. It was essentially the same conundrum that almost a century earlier had derailed Gladstone's attempts to introduce 'home rule' to Ireland (Hadfield, 1989; Bogdanor, 2001). And it had for a brief period become politically salient again during the 1960s when Northern Irish MPs

<sup>3</sup>HC Deb 14 November 1977, c123.

looked set to block Labour prime minister Harold Wilson's nationalisation proposals (Walker and Mulvenna, 2015). But, despite devolution not being implemented at the time of Dalyell's complaint,<sup>4</sup> the quirk which he raised became indelibly associated with him through the naming of the West Lothian Question.

The election of Tony Blair's Labour government in 1997, with its commitment to implement devolution to Scotland and Wales—but not England—meant that this issue moved back into the political foreground. As former prime minister John Major put it: 'It is not just the West Lothian question; it is the west Dorset, west Hampshire and west Lancashire question, and we still await an answer'.<sup>5</sup> From this point onwards, questions about how England was governed and represented began to make their way into British politics, initially through the growing interest of a number of Conservative politicians in these issues. Indeed, as noted by Kenealy *et al.* (2017), the West Lothian anomaly has often been conflated with the much wider English Question.

Following devolution's introduction in the late 1990s, a handful of constitutional experts began to advance the case for addressing the West Lothian Question on the basis of democratic principle and good governance (Hadfield, 2002; Oliver, 2003). Meanwhile, a succession of different schemes was developed by practitioners to deal with this anomaly through prospective changes to Commons procedures. First, the House of Commons Procedure Committee (1999) advanced the fairly modest idea of legislation relating to only one part of the UK being scrutinised by specially constituted 'second reading committees' and standing committees. The following year, the Commission to Strengthen Parliament (2000), established by the opposition Conservative party and chaired by the constitutional expert Lord (Philip) Norton of Louth, proposed a more comprehensive solution whereby legislation that applied only to England would effectively be voted on only by English MPs throughout its Commons stages. A further review was conducted by the Conservative Democracy Task Force (2008), which set out a model for reform that would provide MPs from England and the whole of the UK with a decisive say at different stages of a bill's Commons passage.

A subsequent milestone was the report of the McKay Commission (2013), an independent body chaired by former Clerk of the Commons, Sir William McKay, which was established as part of the Conservative-Liberal Democrat coalition agreement of 2010. The commission accepted the contention that devolution had contributed to a notable anomaly in relation to the legislative position of

<sup>4</sup>This was because the introduction of devolution was contingent on affirmative votes in public referendums. Wales voted decisively against devolution, while in Scotland the narrow vote in support fell short of the required threshold.

<sup>5</sup>HC Deb 14 May 1997, c58.

England, and argued that this now needed to be addressed. It rejected arguments for giving English MPs a ‘veto’ over England-only legislation, proposing instead procedural changes to enhance England’s ‘voice’ at Westminster, reasoning that once England’s preferences were clearly articulated, it would become harder in political terms for MPs across the House to override them. As such, its conclusions were noteworthy for distinguishing between ‘voice’ and ‘veto’ as distinct goals that could be underpinned by different types of institutional mechanism.

While these issues were initially of concern to a fairly limited circle of experts and campaigners, they were nevertheless endowed with greater political energy by a small number of controversial Commons votes that occurred during Tony Blair’s second term in office. In November 2003, MPs voted on an amendment to the Health and Social Care (Community Health and Standards) Bill, which aimed to prevent the controversial establishment of ‘foundation hospitals’ in England. Although rejected by 17 votes, among MPs representing English constituencies it would have passed by 17. Similar circumstances arose two months later in relation to the government’s Higher Education Bill. This was technically UK-wide in its scope but its most controversial provisions involved a rise in tuition fees in England.<sup>6</sup> MPs backed the bill at its second reading stage, but among English (and English and Welsh) MPs the government would have been defeated (by 15 and 6 votes, respectively) (Lodge, 2004; Russell and Lodge, 2006).

Although legislative asymmetry is not unique to the UK, the political interest around the West Lothian Question does appear to be unusual. Michael Keating (1998, p. 208) has observed that an equivalent question has ‘featured in the Canadian debate and, to a lesser degree, in Spain’. For Vernon Bogdanor (2001, p. 233), however, while similar kinds of overrepresentation of devolved regions or provinces in the state-wide legislature are visible elsewhere, there is ‘no “West Madeira Question” nor any “West Sardinian Question”, nor any “West Catalan Question”’. John Hopkins (1998) has considered the case of Spain, where MPs from Andalusia—a region with a significant degree of legislative autonomy—have sometimes exercised a decisive sway in sustaining the Spanish national government. Yet this has not been perceived as illegitimate—partly, he suggests, because asymmetry is accepted as the price of regionalism, and also because its impact is less pronounced in decentralised and consensual political systems such as Spain’s. In the UK, by contrast, the effects of asymmetry are amplified by its majoritarian party system and its highly centralised governmental system. What has also made this feature of the British system more salient is the emergence of a nascent debate about whether the English were content to be the

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<sup>6</sup>This policy also potentially applied in Wales, but the decision on using the power was left to the National Assembly for Wales.

sole remaining people of the UK without their own form of devolution (Kenny, 2014).

## 2. Criteria for assessing EVEL as an answer to the West Lothian Question

Even though this anomaly remained unaddressed for over a decade, a distinctive pattern of argument grew up around the possibility of answering the West Lothian Question through changes to the internal Commons procedures, and its potential importance as an answer—or partial answer—to the English Question. In this section, we review these arguments to identify a series of broad criteria against which to assess EVEL's efficacy as a viable solution to the anomaly. The first two of these relate to the perceived obstacles to reform—beginning with objections that are practical in kind, before turning to more important, constitutional ones. A further two criteria centre on the differing conceptions of what 'answering' the West Lothian Question might be intended to achieve: on one hand, delivering the relatively modest goal of providing a collective legislative veto for English MPs, and on the other, supplying a more expansive kind of English representation at Westminster including a louder 'voice' for England. We outline each of these in turn.

### 2.1 *Practical obstacles*

For some sceptics, any attempt to resolve this anomaly within the parameters of the UK's unitary parliament would necessarily encounter acute institutional and practical obstacles. Some questioned whether it would be realistic for the Commons Speaker to identify England-only legislation, given that the territorial boundaries of Westminster legislation are often unclear, with bills frequently containing provisions relating to varying parts of the UK (Russell and Lodge, 2006; Hazell, 2006). Even if this hurdle was cleared, concerns were expressed that the Speaker's decisions might well be challenged, potentially undermining his or her authority as a neutral arbiter of debate (Hazell, 2006). Meanwhile, it has been suggested that the restriction of certain votes to only a subset of MPs might create a confusing kind of 'legislative hokey-cokey' (Hazell, 2006, p. 225).

### 2.2 *Constitutional obstacles*

More significant objections to EVEL, however, concerned its potential constitutional implications. Some contended that this kind of reform would be inherently incompatible with the ethos of a body tasked with managing the legislative affairs of the UK as a whole, by creating different classes of MPs with different rights.

As Bryant (2008, p. 674) noted, '[t]he standard objection to it is that it would create two classes of MPs . . . and in so doing it would run counter to the sovereignty of parliament exercised equally by all who are elected to it'.

Two more specific constitutional objections flow from this perceived inequality. Some identified a likelihood that legislation that appears at first blush to affect England alone could have indirect consequences for other parts of the UK, given the interconnected nature of the union state—most commonly enunciated in relation to the financial implications of English policy decisions for the block grant to Scotland, Wales and Northern Ireland, via the opaque 'Barnett formula' (Bogdanor, 2010). Secondly, it has been suggested that differential legislative voting rights could disrupt the very logic of parliamentary government. Bogdanor (2010) has observed that provision of special voting rights to certain MPs would inevitably translate into Commons majorities that would vary in size or party composition, depending on the issue at hand. He has long argued that such a system might produce 'bifurcated government', and has posited a scenario in which ministers might be forced 'to switch rapidly to the opposition front bench when an English matter was under discussion, while the opposition front benchers would come to take their places on the ministerial benches' (Bogdanor, 2010, p. 162).

### *2.3 An English legislative veto*

Turning to rationales for reform, arguments about the West Lothian anomaly have tended to focus on legislative voting arrangements. Most mainstream advocates for reform have typically been preoccupied with preventing laws from being imposed on England against the wishes of a majority of its MPs—a focus likely informed by the Commons votes under Blair reviewed above. Were a UK government to be elected without the support of most of England's MPs, such episodes might become routine. In the eyes of many proponents, such a scenario would have the potential to trigger the kind of resentment that could do serious damage to the constitution as a whole, and so a precautionary argument for EVEL began to emerge during the 2000s. As the Conservative Democracy Task Force (2008, p. 1) put it, 'the resulting sense of grievance . . . could undermine the current constitutional settlement'. Whether EVEL has averted this possibility is therefore one important measure of its success.

### *2.4 More substantive English representation at Westminster*

For others, however, devolution to some parts of the UK, but not to England, has embedded an endemic unfairness and helped put the English Question back at the heart of British politics—a view that has been loudly championed by proponents of the idea of an English parliament. This kind of argument is reflected in

former Conservative cabinet minister John Redwood's (2014) assertion that '[w]hat is good enough for Scotland is good enough for England'. Such perspectives bring other dimensions of England's anomalous position, and a wider interpretation of the West Lothian Question, into sight. Dalyell's complaint referenced the possibility of non-English MPs 'exercising an important ... effect on English politics'. But such an 'effect' might plausibly be expressed not only *positively* (in terms of imposing legislation on England), but also *negatively* (in terms of preventing English MPs from enacting legislation). Nor is such an 'effect' logically limited to voting on legislation. It is widely recognised that law-making is only one of a number of important functions performed by legislatures, with others including the capacity to deliberate on the public record and to scrutinise and oversee the executive (Packenham, 1970; Norton, 2013; Kreppel, 2014)—activities that can be considered mechanisms for 'voice'. It is thus important to consider the extent to which EVEL has enhanced English representation at Westminster beyond the narrow provision of a legislative veto.

Failure to distinguish between these two different rationales for reform can contribute to a confusion about what exactly EVEL is intended to achieve and, as we will see, lead to a form of 'over-claiming' about what reform is likely to deliver, especially with respect to 'voice'. We return to these distinctions below, but before doing so, we turn briefly to set out the most important aspects of the new system introduced by the Conservative government in 2015.

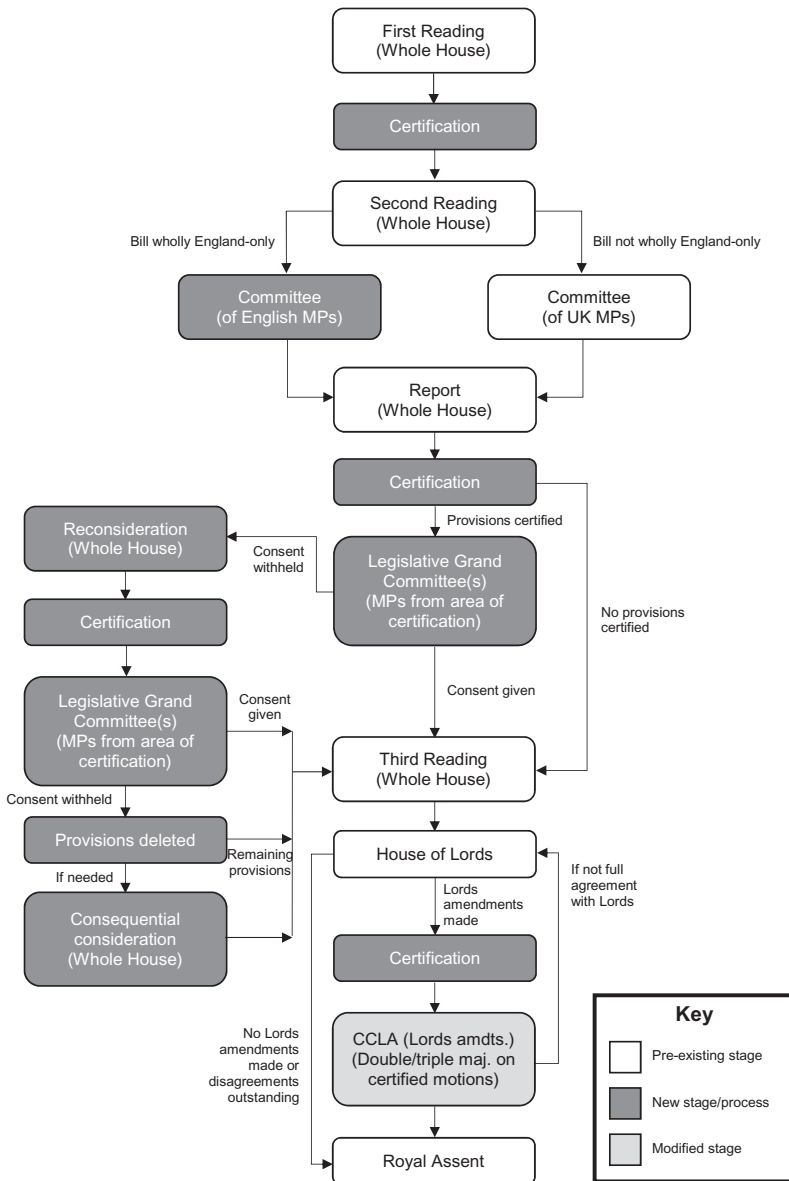
### 3. The 2015 EVEL procedures

The model of EVEL presented by the Conservative government in July 2015, and ultimately introduced with minor revisions several months later, was based on some of the procedural innovations proposed two years earlier by the McKay Commission (2013). But, unlike the latter, the government's scheme attempted to provide English (and English and Welsh) MPs with a binding right to 'veto' affected primary and secondary legislation. Importantly, MPs from across the House retained the right to vote at most of the pre-existing legislative stages. This means that, under EVEL, affected legislation must be approved both by the whole House and by English (or English and Welsh) MPs in order to pass—a system sometimes labelled a 'double veto'.

For primary legislation, the double veto is achieved through a potentially elaborate series of additions to the Commons legislative process. Figure 1 is based on original analysis of the approximately 30 pages of new standing orders,<sup>7</sup> and offers a diagrammatic illustration of the new process. It shows the pre-existing

<sup>7</sup>These were accessed at <https://publications.parliament.uk/pa/cm201516/cmstords/soadd2210.pdf> on 16 December 2017.





**Figure 1.** The EVEL process on primary legislation.

legislative stages (in white) alongside the new stages and processes inserted by EVEL (in dark grey).

Two features of this system deserve particular emphasis. The first is the requirement for ‘certification’ at multiple stages throughout the legislative

process. This is the mechanism for formally identifying legislation that applies only to England (or England and Wales). The Speaker is required to examine most government bills prior to their Commons second reading stage, and to certify any clause or schedule that meets both elements of a two-part test: that it would apply only in England (or England and Wales); and that it would be within the power of a devolved legislature in a different part of the UK to make comparable provision. The Speaker must perform a similar exercise at certain other points in the process, to ensure that any new provisions inserted after second reading stage are also identified.

The second innovative feature of these new procedures is the establishment of 'legislative grand committees'. These constitute the principal mechanism through which the EVEL veto may be applied. They are composed of all MPs representing constituencies in England (or England and Wales)—although other MPs may speak (but not vote)—and they consider 'consent motions' relating to any certified legislation. Such motions are designed to echo the 'legislative consent motions' that are now routinely considered by the UK's devolved legislatures, which authorise the Westminster parliament to legislate in devolved policy areas (in line with the 'Sewel convention'). Under EVEL, if a legislative grand committee withholds consent to any certified provisions, and an attempt at compromise fails, the provisions in question are automatically deleted from the bill and so cannot form part of the legislative text as ultimately approved by the Commons. If the House of Lords makes any amendments to the bill after its initial passage through the Commons, these amendments must similarly be approved by MPs—but the veto right is achieved through a system of 'double majority' voting rather than through legislative grand committees.<sup>8</sup>

#### 4. An answer to the West Lothian Question?

In the remainder of this article we provide an analysis of how EVEL operated during the 2015–2017 parliament and ask whether, on the basis of the evidence of its early operation, it can be considered to have 'answered' the West Lothian Question in any meaningful sense.<sup>9</sup> It is structured to consider each of the four criteria outlined above. We consider first whether the system has successfully overcome the main practical and constitutional obstacles. We then proceed to evaluate whether it has succeeded in establishing an effective English legislative

<sup>8</sup>Under double majority voting, a majority both of the whole House and of MPs from the area of certification must support a motion for it to pass. In specific circumstances, a triple majority can also be required. This double majority voting system also applies to certified secondary legislation.

<sup>9</sup>Our data covers the period from 23 October 2015 (when EVEL came into force) until 27 April 2017 (the final date the Commons sat prior to the 2017 general election).

veto, before considering its contribution to more substantive forms of English representation including provision of a clearer ‘voice’.

It would be unwise at this juncture to offer hard-and-fast judgement about a system that is still relatively new and in some ways untested. But with this proviso in mind, we conclude that most of the fears enunciated by its critics have not, thus far, been borne out. Whether this reflects the merits of this system and its design, or the relatively benign political conditions in which EVEL has as yet operated, is a moot point. More generally, we emphasise that, when articulating the case for EVEL, ministers have confused and conflated different types of rationale for answering the West Lothian Question—a more precautionary case for an English legislative veto, on the one hand, and an argument for greater equity in the treatment of England after devolution. This has given rise to a form of ‘over-claiming’ which may well come back to bite the advocates of this system.

#### *4.1 Practical obstacles to EVEL*

With respect to the various practical obstacles that have been feared by sceptics, the evidence derived from the 2015–2017 parliament suggests that these pessimistic predictions have not thus far been realised. Table 1 presents data on the Speaker’s certification of legislation during this period. This shows that, of 33 government bills eligible for certification, just over half (18) had at least one provision certified. In addition, the Speaker certified around a quarter of affirmative statutory instruments laid before the Commons during this period. Although certification is potentially an administratively laborious process—as one senior Commons official explained to us in an interview, it requires ‘quite a lot of work, I mean in terms of the quantity’—we nevertheless found little evidence that the Commons authorities were unduly burdened in this period by the requirement to make adjudications. This is an important observation because it tends to undermine the common claim that it is not practical to identify England-only legislation. More broadly, there were no instances in this period when the EVEL processes impacted negatively on the time available for the existing scrutiny stages, while the potential for legislative ‘hokey-cokey’ was minimised by the introduction of the electronic counting of Commons votes.<sup>10</sup>

Certification has been undertaken on far more occasions than some critics imagined would be possible, for two main reasons: the Speaker is required to consider each clause of a bill, rather than only whole bills; and EVEL does not apply solely to

<sup>10</sup>Indeed, Hazell (2006) had earlier identified this as the most plausible solution. This development, which had already been planned, involved Commons officials recording divisions on tablet devices, and enabled separate results for different territorial areas to be easily computed. On two early occasions the system malfunctioned (HC Deb 19 January 2016, cc1349-50; 10 February 2016, cc1691-92), but subsequently operated smoothly.

**Table 1** Certification of clauses and schedules, bills and affirmative statutory instruments, as a proportion of the total considered, 2015–2017 parliament

	Certified as relating to				Eligible for certification	Percentage of eligible certified (%)
	E	EW	EWNI	Total		
Clauses and schedules <sup>a</sup>	271	218	12	501	1922	26
Bills with certified provisions <sup>b</sup>	13	10	2	18	33	55
Affirmative statutory instruments	35	24	0	59	259	23

E (England), EW (England and Wales), EWNI (England, Wales and Northern Ireland).

<sup>a</sup>In version of the bill prior to Commons second reading.

<sup>b</sup>At any point during the bill's passage.

Notes: Eligible bills and statutory instruments are those eligible to be considered by the Speaker for certification, according to the Commons standing orders. Eligible clauses and schedules are those that made up eligible bills. The three territorial columns do not add up to the total for bills, as seven bills had separate provisions certified as relating both to England and to England and Wales.

England-only provisions, but also extends to legislation that has effect only in the jurisdiction of England and Wales.<sup>11</sup> Had neither of these features been present in the new procedures, not a single bill would have been certified under them.

We noted above the concerns of some commentators that certification might cause the office of the Speaker to be dragged into political controversy, given that his or her decisions would determine MPs' voting rights on potentially contentious legislation. This complaint resurfaced in 2015 in response to the procedures introduced by the government.<sup>12</sup> Yet the evidence associated with the first two years of EVEL's operation suggests that this fear has not been borne out. On only a small number of occasions did MPs publicly seek to clarify the reasons for the Speaker's decisions on the floor of the Commons,<sup>13</sup> and these queries did not involve questioning of the Speaker's authority or integrity. More generally, MPs' dissatisfaction on this score has typically been directed towards the government for its design of the procedures, rather than against the Speaker for his application of them.<sup>14</sup>

One particularly revealing illustration of these trends concerns those occasions when the Speaker took decisions about certification that conflicted with those

<sup>11</sup>And occasionally to England, Wales and Northern Ireland, as explained above (n 1).

<sup>12</sup>For example, Pete Wishart anticipated that certification would place the Speaker in an 'intolerable and politically invidious situation' (HC Deb 2 July 2015, c1651).

<sup>13</sup>Tasmina Ahmed-Sheikh, HC Deb 2 November 2015, c719; Lady Sylvia Hermon, HC Deb 12 January 2016, c805.

<sup>14</sup>For example, Lady Sylvia Hermon, HC Deb 26 January 2016, c228; Alan Brown, HC Deb 2 November 2015, c747.

anticipated by the government in its own published advice. Our analysis identified apparent disagreements on at least ten bills.<sup>15</sup> The most apparent of these was on the Higher Education and Research Bill of 2016–2017, for which the Speaker initially certified only 8 of its 125 clauses and schedules—significantly fewer than the 71 anticipated by the government.<sup>16</sup> Very little controversy arose from these disagreements. The government seemed content to accept the authority of the Speaker's rulings and these differences of judgement between the executive and the Commons authorities went largely unnoticed by most MPs. Commenting on an earlier disagreement, one anonymous Scottish National Party MP observed to us that 'the Speaker and his clerks did not just blindly follow what the government suggested', while another also told us, 'the clerks are actually clearly doing a better job [than the government]'. Over time, it may, therefore, be that these signs of the Speaker's independence offer reassurance to MPs who might otherwise dispute his or her certification decisions.

#### *4.2 Constitutional obstacles to EVEL*

Logistical and practical questions aside, the constitutional implications of the procedures are much harder to determine—not least because arguments for and against EVEL are rooted in broader perspectives about the merits of the UK's constitution, and the best way of ensuring its continuation, which are not themselves subject to empirical refutation. Even so, an assessment of EVEL's operation during this first parliament affords the opportunity to reflect upon some of these long-established constitutional objections.

The worry that EVEL might create 'two classes' of MPs was widely echoed in the debate about these procedures which took place in the House during 2015, and this became a standard complaint among some MPs—particularly on the question of the so-called 'Barnett consequentials' of legislation that appeared mainly to affect England. During these debates it was argued that the new procedures would establish 'two classes of Members of Parliament', 'second-class MPs', or even make some MPs 'fourth-class'.<sup>17</sup> This complaint also figured in a

<sup>15</sup>The government's advice is published in the bill's explanatory notes and in separate memoranda, all typically available on the parliament website. For examples of apparent disagreements from the first 12 months of operation, see [Gover and Kenny \(2016a\)](#).

<sup>16</sup>Based on original analysis of guidance on territorial extent and application in [Department for Business, Innovation and Skills \(2016\)](#).

<sup>17</sup>Wayne David, HC Deb 7 July 2015, c228; Alan Brown, HC Deb 22 October 2015, c1223; Angus MacNeil HC Deb 15 July 2015, c975.

wider public debate about EVEL which took place in Scotland in 2015, and in a much more limited way in England.<sup>18</sup>

A historical perspective upon debates about the territorial equality of MPs offers a useful perspective on this sensitive issue. The Westminster parliament has long granted differential rights to members in particular circumstances, and some of these have been territorially determined. Thus, only MPs representing Scottish constituencies may serve as members of the Scottish grand committee—a body that is in practice defunct but whose operation remains part of the Commons procedures—while those representing Welsh and Northern Irish seats are automatically members of the Welsh and Northern Ireland grand committees, respectively. It could be, therefore, that introducing this system represents less of a departure from established practice than has sometimes been supposed.

Since EVEL's implementation, the complaint about two classes of MPs has gradually receded from view. One reason for this stems from the specific political circumstances in which EVEL was introduced. During the 2015–2017 parliament, the Conservative government enjoyed a larger majority in England than across the UK, and consequently these procedures did not alter the outcome of any legislative decisions made by the Commons.<sup>19</sup> But the complaint has also been mitigated by other features of the new system. One is the lack of visibility of the EVEL procedures beyond Westminster. Another is the 'double veto' that they provide. All MPs retain the right to participate at most of the existing stages of legislative scrutiny, including the right to vote against a bill outright if they wish. This means that, even if certified legislation did have indirect, negative consequences for other parts of the UK (as referenced above, e.g. via the Barnett formula), MPs representing these other territories would be in no weaker position to block it than they were previously.

The remaining significant constitutional objection highlighted above concerns the risk of creating 'bifurcated government'. This scenario also appears to have been blunted by the particular design of the system introduced in 2015. The 'double veto' model means that the UK government may continue to use its (usually) predominant position across the whole House to vote down proposals with which it disagrees, even if these are backed by English MPs. But the possibility of bifurcated government is in fact further inhibited by other factors. The identity of the UK government has traditionally been determined by reference to the party balance among the House of Commons as a whole, and this key factor is not

<sup>18</sup>Following the Commons' adoption of EVEL, the front page of *The National*, a Scottish newspaper advocating independence, read: '2nd Class: Evel passes and Scottish MPs are shut out. . . but is independence a step closer?' (23 October 2015).

<sup>19</sup>A total of 22 divisions were subject to the EVEL procedures, but in no case was the outcome changed.

affected by the EVEL procedures.<sup>20</sup> The government possesses various mechanisms within the pre-existing procedures of the House of Commons to manage legislative business, including control over parliamentary time and the exclusive power to initiate taxation and spending provisions. Such tools mean that the possibility of an opposition party with a majority in England effectively displacing the UK government on England-only matters remains remote, at least as a direct consequence of these procedures.

#### 4.3 *An English legislative veto*

That the fears of its critics appear not to have been borne out does not necessarily entail the validation of this reform. We turn now to ask whether EVEL has achieved its architects' goals, beginning with the precautionary legislative veto.

Under the EVEL procedures English (and English and Welsh) MPs have been granted with a new and binding right to veto legislation that applies to the relevant part of the UK. This does constitute a move into new constitutional territory—as one Conservative MP we interviewed put it, 'it is a major change to our corporate identity'. During the 2015–2017 parliament this veto right was never exercised (principally because the Conservative government was in a stronger position among English MPs than across the whole House). But it is likely that, in due course, a UK government will be elected that is better represented across the whole House than in England. In such a scenario, the veto right provided under EVEL would acquire much greater political significance. In the wake of the significant controversy generated by the small number of occasions during Blair's premiership when legislation was seen to have been imposed on England against the will of its representatives, this veto right represents an important constitutional innovation.

The new right of veto has two apparent limitations. First, any future government without a majority in England could in principle use its strength across the whole House revoke the EVEL procedures. Yet such a move may well incur a political cost within England, particularly if the procedures have by then become an accepted feature of Commons procedure. Second, and perhaps more importantly, it remains possible for England-only legislation not to be certified under EVEL. This is illustrated by government proposals to relax Sunday trading rules through the Enterprise Bill in 2016. Although this policy would only have applied in England and Wales, the Speaker's provisional certificate confirmed that it did not meet the certification tests.<sup>21</sup> This was because the relevant clause also

<sup>20</sup>Indeed, it now appears to be reflected in statute law through the Fixed-term Parliaments Act 2011.

<sup>21</sup>The provisional certificate was accessed at <https://www.parliament.uk/documents/commons-public-bill-office/2015-16/English-votes-for-English-laws/Speaker's-provisional-certificate-Enterprise-Bill->

contained material relating to employment rights in Scotland. Under EVEL, however, whole clauses are considered for certification, not components within them. This episode demonstrates rather well that, should ministers in future wish to circumvent the veto right provided by EVEL, there is every chance that this could be relatively easily achieved through the ‘tactical’ drafting of legislation.

These weaknesses aside, however, EVEL has succeeded in establishing a fairly robust form of legislative veto. Equally, it would be a mistake to judge the constitutional implications of EVEL purely in terms of the actual employment of this veto right. Scholars studying legislatures, including the Westminster parliament, have drawn attention to the power of ‘anticipated reactions’, whereby executives modify their legislative proposals in advance of submitting them to legislators in order to avoid the risk of embarrassing and politically costly defeat (Norton, 2013; Russell and Gover, 2017). By providing a veto right to groups of MPs other than the whole House, EVEL may well generate some largely invisible effects upon pre-legislative government behaviour, a consideration that has been overlooked in constitutional debates about it.

#### *4.4 More substantive English representation at Westminster*

Yet the anomaly around English representation extends beyond the lack of a legislative veto. Above we highlighted two further dimensions: the inability to exercise a positive vote *for* legislation (as opposed to the capacity to vote *against* it), and the lack of broader mechanisms for ‘voice’.

Under EVEL, the backing of the UK-wide House remains *necessary* even if it is no longer *sufficient* for legislation to pass. This means that English MPs remain unable to force through legislation against the wishes of UK-wide MPs—a situation that in time may prove unacceptable to some MPs and wider English audiences.

This feature can be illuminated through reference to two different controversies that arose during the 2015–2017 parliament. In July 2015, the government laid before the Commons secondary legislation to relax the rules governing fox-hunting in England and Wales.<sup>22</sup> But a scheduled vote to approve this change was abandoned after the Scottish National Party indicated that it would vote with Conservative backbenchers and others against the move, making a government defeat much more likely (Mason, 2015). Although this played out prior to EVEL’s introduction, the government’s decision not to return to this issue illustrates that these procedures would not have helped to circumvent the decisive

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160307.pdf on 20 January 2018. As explained below, this provision was deleted from the bill prior to the Speaker’s final certificate.

<sup>22</sup>Draft Hunting Act 2004 (Exempt Hunting) (Amendment) Order 2015.



influence of the entire House and the disproportionate power that small groups of MPs from outside England can, in certain circumstances, wield.

Subsequently, the provision to relax Sunday trading rules in England and Wales was deleted from the Enterprise Bill in a government defeat at Commons report stage. This policy achieved the backing of MPs in England and Wales, but it was MPs representing Scottish constituencies (where it would not directly have applied) who ultimately proved decisive (Gover and Kenny, 2016b). Although this provision would not have been certified (as explained above), even if it had been EVEL would not have helped the government to pass it.

To clarify the extent to which EVEL does, and does not, answer the West Lothian anomaly on legislative voting, it is helpful to compare it to the devolved legislatures, and, specifically, to distinguish between two different ways in which these devolved bodies approve legislation in policy areas that are within their competence. The first, and most common, mechanism is for legislation to be introduced into the relevant devolved legislature, where it is scrutinised and voted on by representatives elected from that part of the UK. But an alternative mechanism that has been developed is for the legislation to be passed by the UK-level Westminster parliament, but with the expressed consent of the appropriate devolved legislature under the operation of the ‘Sewel convention’. EVEL has been designed to be, in some ways, analogous to the second of these mechanisms, but not the first. Consequently, English MPs remain unable to force through legislation against objections from non-English representatives and are thus in a ‘weaker’ position than their devolved counterparts. Seeking to rectify this asymmetry would necessitate the kind of radical institutional overhaul that is currently outside the bounds of mainstream debate.<sup>23</sup>

Moreover, legislative voting is only one component of parliamentary activity, and Dalyell’s query is also potentially relevant to these other functions. In the Westminster parliament, these include the opportunity to hold debates, question ministers and conduct formal inquiries—functions which are also mirrored within the devolved legislatures. These can be understood as mechanisms enabling the expression of ‘voice’, rather than simply the right to ‘veto’ proposed legislation. While these tools clearly can be, and are, used by English MPs at Westminster on policy matters that in practice relate only to England, they are not bagged, or even acknowledged, as being territorially bounded in this way.

David Cameron, as quoted in the introduction above, argued that EVEL would enable England’s voice to be better heard within the UK legislature. Subsequently, his party’s 2015 English manifesto claimed that the reform would enable ‘English MPs to express their voice on matters affecting England only’

<sup>23</sup>It does have a small but growing number of proponents, e.g. see the Campaign for an English Parliament, accessed at <http://www.thecep.org.uk> on 20 January 2018.

**Table 2** Length of legislative grand committees and number of speakers, 2015–2017 parliament

	LGCs	Length (mins)	Speakers				
			E	S	W	NI	UK
Housing and Planning Bill	2 (EW, E)	43	13	3	1	1	18
Childcare Bill	1 (E)	2	0	0	0	0	0
Charities (Protection and Social Investment) Bill	1 (EW)	14	3	0	0	1	4
Enterprise Bill	2 (EW, E)	4	0	0	0	0	0
Energy Bill	1 (EW)	2	0	0	0	0	0
Policing and Crime Bill	2 (EW, E)	4	0	0	0	0	0
Finance (No. 2) Bill (2015–2016 session)	1 (EWNl)	2	0	0	0	0	0
Higher Education and Research Bill	2 (EW, E)	4	0	0	0	0	0
Digital Economy Bill	1 (E)	6	1	2	0	0	3
Neighbourhood Planning Bill	2 (EW, E)	2	0	0	0	0	0
Technical and Further Education Bill	2 (EW, E)	4	0	0	0	0	0
Children and Social Work Bill	2 (EW, E)	6	1	1	0	1	3
National Citizen Service Bill	1 (E)	2	0	0	0	0	0
Bus Services Bill	1 (E)	2	0	0	0	0	0
Finance (No. 2) Bill (2016–2017 session)	1 (EWNl)	1	0	0	0	0	0

E (England), S (Scotland), W (Wales), NI (Northern Ireland), UK (United Kingdom), EW (England and Wales), EWNl (England, Wales and Northern Ireland), LGC (legislative grand committee).

Notes: Length of time calculated from time Deputy Speaker took chair until start of third reading. Speakers are the number of unique MPs who spoke in the legislative grand committee on that bill, excluding the committee chair and any interventions to move the consent motion or to raise a point of order.

(*Conservative Party*, 2015, p. 8). Yet it is far from clear that EVEL offers any notable enhancement of the expressive and deliberative power of English MPs, or gives more voice to England in any meaningful sense. More generally, there is a palpable sense that the newly established legislative grand committees have failed to provide a discernible English dimension to the legislative process or promote a clearer English voice.

The specific design of the system introduced in 2015 appears to be partly responsible for this deficiency. Unlike the proposals produced by the *McKay Commission* (2013), which anticipated the English-consent stage of a bill happening relatively early in its life, the new procedures have situated it much later on in the legislative process so as to ensure that amendments agreed by MPs later in the bill's passage can, in principle, be subject to the veto of English representatives. These new England-only (or England and Wales-only) committees sit between two existing, substantive stages (report and third reading), and, as a consequence, there has been little appetite for conducting scrutiny or debate during them. As shown in *Table 2*, during EVEL's first year in operation, most of the legislative grand committees were entirely perfunctory, with few or no substantive contributions being made.

One important conclusion arising from our analysis of how these new procedures worked during the parliament of 2015–2017, therefore, is that there may

well be an inherent trade-off between the achievement of ‘voice’, on the one hand, and ‘veto’ on the other. No single institutional mechanism can easily achieve both of these goals. This is in part because designing a relatively comprehensive kind of veto for a territorial subgroup of MPs requires a complicated set of additional stages to the legislative process, many of which are opaque to MPs and the wider public. The new system introduced in 2015 required the addition of around 30 pages to the Commons standing orders, and inserted up to eight new legislative stages during a bill’s Commons passage. These procedures were also, rather notably, drafted in a legalistic manner that is alien to the manner in which the great bulk of Commons procedures are penned.

The inherent tension between voice and veto has not been highlighted in the scholarly literature on this topic, and was not noted by the scheme’s architects in 2015. The failure of EVEL to facilitate any meaningful English voice also illustrates the dangers that can arise when different arguments for reform are conflated. There is a risk that ministers have ‘over-claimed’ in talking up what this kind of reform can achieve, and this could well lead to problems of expectation management in the future. As one MP opposed to the procedures told us, ‘any political advantage the government have got by doing this will be dissipated pretty quickly once people realise just how insignificant a measure it actually is. It just tackles one tiny part of the English Question.’

## 5. Conclusions

It is, we suggest, unwise to offer hard-and-fast judgements about a system that has so far operated in rather un-testing political conditions. But with this caveat in place, our assessment of EVEL’s operation up to 2017 leads us to conclude that some of the main fears and hopes surrounding its implications for the representation of English interests in the UK parliament have been exaggerated. While it is true that English MPs have acquired additional potential leverage in their relations with government, it is also the case that EVEL has in some ways been ‘mid-sold’ by its architects. Presented both as a means of boosting the voices of the English in parliament, and as a meaningful proxy for the development of devolution elsewhere, EVEL has disappointed on both of these fronts.

At the same time, it is important to note that, despite the scepticism with which the idea of answering the West Lothian Question has been viewed in expert constitutional circles in the last two decades, it has been introduced since 2015 without appearing to damage the legislative process unduly, and without institutionalising major divisions between different groups of MPs. This may in part be down to the benign political conditions that prevailed in that parliament, but it may also reflect some of the design features of this system, not least the ‘double veto’.

On the larger question of whether these procedures provide a meaningful form of English representation at Westminster, our research leads us to a more sceptical response. EVEL has not eliminated the basic territorial anomaly associated with legislative voting in the House of Commons, which has been exacerbated by devolution. Nor has this new system managed to provide a more visible kind of symbolic representation for the English. In this sense, despite the considerable energy expended on these changes and the inconvenience they have caused for parliament and government alike, it is not clear that they have fundamentally changed the rules of the legislative game along the lines anticipated by their supporters.

More generally, while much of the critical discussion of this reform has tended to focus on various practical and institutional problems it might engender, or has worried about the wider constitutional implications of EVEL, there has been relatively little consideration of a related, but different, question: whether it will over time come to acquire legitimacy across the House. The longer-term future of a set of rules that were passed with the support of only one party in the Commons appears precarious. This is an especially pertinent point given that the House elected in June 2017 effectively has a majority of MPs representing parties that have until now been consistently opposed to this system.<sup>24</sup> In these new circumstances the lack of thought and effort given to building a wider cross-party coalition of support for EVEL may well come back to haunt the system's architects.

The territorial character of the 2017 election outcome has left the Conservative government dependent upon the votes of the Democratic Unionist Party, which operates only in Northern Ireland, and upon newly elected Scottish Conservative MPs. Given that the Conservative party retains a larger majority in England than it does at the UK level, the EVEL procedures do not themselves appear to represent an immediate threat to this administration.<sup>25</sup>

And yet, the West Lothian Question—to which these procedures were designed to respond—may well recur in the coming years, adding considerably to the political instability and constitutional uncertainty associated with Brexit. In constituencies situated in Great Britain (i.e. England, Scotland and Wales) the Conservatives secured a majority of just four, meaning that on certain issues—such as employment rights, certain welfare decisions and renewable energy—the smallest of rebellions could leave the government reliant on MPs from outside the territories affected by its legislative plans. Should the West Lothian

<sup>24</sup>In June 2017, 316 MPs represented the only party that in 2015 voted for the procedures, while 322 represented parties that voted against. (Figures here and below exclude the Speaker and three Deputy Speakers, all of whom in 2017 represented English constituencies.)

<sup>25</sup>Following the 2017 election, the Conservatives formed a minority UK government, but nevertheless had a majority of 61 in England, and 37 in England and Wales.

conundrum return—this time dressed up as the East Londonderry issue—the question of what rules are employed by parliament in relation to legislation that applies to some parts of the UK, but not others, may well come back to the political fore. Rather than decisively answering the West Lothian Question, EVEL may turn out to have opened up a series of new and equally intractable questions about the territorial legitimacy of parliamentary governance across the UK.

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